SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FOURTH CIRCUIT JANUARY 1994-AUGUST 1999

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Table of Contents

Page

Table of Authorities

Page

Page

U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — FOURTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 119 S. Ct. 568 (1998). The district court did not err in applying a cross-reference that resulted in a substantial increase in the defendants' sentences. The cross-reference in §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; the defendants had previously been acquitted of the homicide in state court. The defendants argued that the increase was so large that it could not be imposed on the basis of conduct they had been acquitted of without a violation of their rights to due process. The court of appeals rejected this argument, reasoning that the §2K2.1(c)(1)(B) cross-reference does not create any presumption that the firearm offense of which the defendants were convicted involved death. Further, the court of appeals reasoned that the increase to which the defendants were exposed on account of the cross-reference, from 42 to 55 years of imprisonment and from 115 to 210 months of imprisonment, respectively, was not so profound that it is sufficient to implicate due process concerns or to give the impression of having been tailored to permit the application of the cross-reference to be a tail which wags the dog of the substantive offense. The cross-reference does not create a new offense or increase the statutory maximum to which the defendants were exposed, but merely limits the discretion of the district court in selecting an appropriate sentence within the statutorily defined range.

§1B1.2 Applicable Guidelines

United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994). The district court erroneously applied USSG §2D1.2 as a specific offense characteristic to increase the defendant's base offense level. The defendant was charged with conspiracy to possess with intent to distribute cocaine and marihuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. The indictment also included a reference to the defendant's use of persons under the age of 18 in furtherance of the conspiracy, in violation of 21 U.S.C. § 861. However, he was never actually charged with this offense, and the jury was never asked to find whether this activity occurred. Nonetheless, the district court enhanced the defendant's base offense level because the indictment gave him notice that his conduct violated section 861. In effect, the district court treated §2D1.2 as a specific offense characteristic. The circuit court disapproved of this approach and concluded that it was inconsistent with the plain language of the guidelines. *But see* United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993) ("Section 2D1.2 does not require a conviction under 21 U.S.C. § 860 in order to consider such drug activities as relevant conduct in calculating the defendant's base offense level." *Id*. at 587 n. 4). Section 1B1.2 instructs the sentencing judge to determine first the

proper guideline and then any applicable specific offense characteristics under that guideline. Section 2D1.1, the guideline applicable in the instant case, has its own specific offense characteristics which do not include a cross-reference to section 2D1.2. Had the Commission wanted to include the use of persons under the age of 18 as a specific offense characteristic, it could have done so under section 2D1.1(b).

§1B1.3 Relevant Conduct

United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994). The district court did not err in applying a two-level enhancement for possession of a gun during a drug trafficking crime pursuant to USSG §2D1.1(b)(1) even though the gun belonged to one of several co-defendants and the government did not prove that the other co-defendants knew anything about it. The Fourth Circuit held that pursuant to USSG §1B1.3, it is appropriate to apply the enhancement to codefendants when it is reasonably foreseeable to them that a co-participant was in possession of a weapon. Quoting the First Circuit, the Fourth Circuit held that "[a]bsent evidence of exceptional circumstances, . . . it [is] fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash." *See* United States v. Bianco, 922 F.2d 910, 912 (1st Cir. 1991).

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The district court erred in applying the abuse of a position of trust enhancement to the defendants based on the acts of their co-conspirator. The circuit court rejected the government's argument that the Pinkerton principle that is embodied in relevant conduct applies to the role in the offense adjustments. The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability. Application of Pinkerton and USSG §1B1.3 would undermine the purpose of the role in the offense adjustments which seek to distinguish among different levels of culpability.

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Defendant Patterson pleaded guilty to distributing morphine and Demerol which resulted in the death of a female minor. Defendant Laythe pleaded guilty to aiding and abetting that offense. The defendants argued that the death was not reasonably foreseeable to them, and that in sentencing, the appellate court should "draw an analogy to recent drug conspiracy cases in which defendants, whose convictions are based upon the total quantity of drugs in the conspiracy, are sentenced according to the quantity of drugs reasonably foreseeable to each defendant." The appellate court declined to draw such an analogy, and noted that under the sentencing guidelines, the district court must consider relevant conduct in determining the appropriate offense level. As part of relevant conduct under USSG §1B1.1 (a)(1)(A), the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." The acts of distributing and aiding and abetting the distribution of the drugs are "wholly encompassed within the express language of subsection (A), which does not require a finding of reasonable foreseeability." The convictions and sentences were affirmed.

United States v. Walker, 29 F.3d 908 (4th. Cir. 1994). The district court did not err in its disposition of two sentencing issues related to Federal Rule of Criminal Procedure 32(c)(3)(D), and USSG §1B1.3. First, the defendant argued that the district court erred in its application of Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to address his objection to the presentencing report recommendation that he be denied an adjustment for acceptance of responsibility. Second, the defendant argued that the district court erred by finding that the amount of loss caused by the defendant's fraudulent conduct exceeded $200,000 and by increasing his offense level under USSG §2F1.1(b)(1)(l). The Fourth Circuit held that both of the defendant's claims lacked merit. On the first issue, the Fourth Circuit held that given the defendant's "specific objections" to the factual findings underlying the presentencing report recommendation that he be denied an adjustment for acceptance of responsibility, it is apparent that the district court satisfied its judicial obligation by making an adequate finding as to the defendant's allegations. *See* United States v. Morgan, 942 F.2d 243, 245 (4th Cir. 1991). On the second issue, the Fourth Circuit held that "the defendant's undervaluing of his personal property itself — wholly independent from the government's calculation of the amount of loss — conclusively established that the amount of loss exceeded $200,000." *See* USSG §1B1.3(a)(3).

§1B1.8 Use of Certain Information

United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 119 S. Ct. 251 (1998). The district court erred in relying on the defendant's statements to his probation officer regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant. The statements were protected under the defendant's plea agreement from use in determining the defendant's applicable guideline range.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995), *cert. denied*, 517 U.S. 1211 (1996). The defendant was not eligible for retroactive application of an amendment to the commentary to USSG §3B1.1, enacted several months after his sentence was imposed, which would have prevented the application of the enhancement. The circuit court ruled that the defendant was not entitled to retroactive application of the guideline because the amendment created a substantive change in the circuit's operation of USSG §3B1.1. In making this determination, the circuit court noted that USSG §1B1.10 allows for consideration of a reduced sentence only if the amendment is listed in that guideline. The 1993 amendment to USSG §3B1.1 was not listed in USSG §1B1.10. The circuit court recognized, however, that the courts may give retroactive application to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in USSG §1B1.10. However, the circuit court determined the amendment to be substantive rather than clarifying, because it changed the law in the circuit. Prior to the amendment, the Fourth Circuit had concluded that a defendant could receive the aggravated role enhancement without having exercised control over persons; the amendment, however, provides that the defendant must have exercised control over other persons to warrant the enhancement. The circuit court noted that its decision is in accord with other circuit courts holding that an amendment would be classified as substantive, and not clarifying when it cannot be reconciled with circuit precedent. *See*

United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991), overruled on other grounds, Stinson v. United States, 113 S. Ct. 1913 (1993). The circuit court recognized and noted its disagreement with the Seventh Circuit's holding in United States v. Fones, 51 F.3d 663, 669 (7th Cir. 1995), that the 1993 amendment to USSG §3B1.1 was a clarifying amendment. The Seventh Circuit applied the amendment retroactively even after acknowledging that the amendment "nullified" its interpretation of the guideline.

CHAPTER TWO: *Offense Conduct*

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Murray, 65 F.3d 1161 (4th Cir. 1995). The district court did not err in enhancing the defendant's sentence for making an "express threat of death" during a robbery when the defendant was unarmed. The circuit court ruled that "a threat to shoot a firearm at a person during a robbery, created by any combination of statements, gestures or actions that would put an ordinary victim in reasonable fear for his life, is an express threat of death under USSG §2B3.1, even though the person delivering the threat is not in possession of a firearm." The Fourth Circuit joined the interpretation of "express threat of death" adopted by the majority of the circuits that have addressed this issue. *See* United States v. France, 57 F.3d 865, 867 (9th Cir. 1995); United States v. Hunn, 24 F.3d 994, 997 (7th Cir. 1994); United States v. Robinson, 20 F.3d 270, 276-77 (7th Cir. 1994); United States v. Lambert, 995 F.2d 1006, 1008 (10th Cir), *cert. denied*, 114 S. Ct. 333 (1993); United States v. Smith, 973 F.2d 1374 (8th Cir. 1992).

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994), *cert. denied*, 516 U.S. 863 (1995). The district court properly enhanced the defendant's sentence for influencing an official in a sensitive position pursuant to USSG §2C1.1(b)(2)(B). The defendant was convicted of bribery of a Navy employee who, as supervisory engineer, used his position to acquire and transfer information to the defendant relating to defense contract procurements. The defendant argued that since his Navy contact was only a GS-15 Navy engineer, he was merely a mid-level employee who lacked the power to award contracts on his own. The court of appeals disagreed, citing to the contact's position on the procurement review panel as evidence of his sensitive position. His position on this three person board provided him with the opportunity not only to obtain the information, but also to influence the Navy's final decision making, since it was unlikely that the Navy would grant a bid without the favorable opinion of the review board.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

United States v. Fletcher, 74 F.3d 49 (4th Cir.), *cert. denied*, 519 U.S. 857 (1996). The defendant argued that the amendments to USSG §2D1.1 and its inclusion in USSG §1B1.10(c) for retroactive application required resentencing. The appellate court agreed and remanded the case for resentencing. The amended guideline provides that each marijuana plant is equivalent to 100 grams of dry marijuana, regardless of the number or sex of the plants involved. Under the amended provision, the defendant was responsible for the equivalent of 72.2 kilograms of dry marijuana (level 22, guideline range 41 to 51 months), rather than 722 kilograms (level 30, guideline range 97 to 121 months). The appellate court noted that despite the guidelines determination that the defendant's offense involved less than 100 kilograms of marijuana, "it appears that he nonetheless will remain subject to the mandatory minimum sentence of 60 months in prison due to his involvement with 100 marijuana plants or more. *See* 21 U.S.C. § 841(b)(1)(B)(vii)."

United States v. Harris, 39 F.3d 1262 (4th Cir. 1994). The district court sentenced defendant Boone to a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A), based on its aggregation of quantities of different controlled substances involved in the conspiracy, to arrive at 52 grams of cocaine base. Subsequent to his sentencing, the appellate court decided United States v. Irvin, 2 F.3d 72, 73, 77 (4th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3552 (1994), which noted that although aggregation of drug quantities may be required sometimes under the sentencing guidelines, "section 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics." The sentence was vacated and remanded for resentencing in light of Irvin.

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The defendant was convicted of conspiracy to possess and distribute cocaine base. The district court did not commit clear error in converting all the cocaine powder found in his apartment into cocaine base for sentencing purposes, where credible evidence was presented to establish that the powder cocaine was manufactured into cocaine base for distribution.

See United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994), §1B1.3, p. 2.

United States v. Turner, 59 F.3d 481 (4th Cir. 1995). The district court erred in ruling that the 0.4 mg conversion factor in Amendment 488 did not apply to liquid LSD because liquid LSD is not on a carrier medium. The defendant was convicted of conspiracy to possess with intent to distribute in excess of one gram of LSD, distribution of LSD within 1000 feet of a school, and aiding and abetting in the possession with the intent to distribute marijuana within 1000 feet of a school. The defendant was sentenced to 108 months imprisonment, six years of supervised release, $220 restitution and $150 special assessment. Amendment 488 instructs courts not to use the weight of the carrier medium in calculating drug quantity for LSD offenses, to treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD and contains an application note which

defined liquid LSD as "LSD that has not been placed onto a carrier medium." The defendant argued on appeal that his base offense level should be determined by converting the dosage units of the liquid into LSD quantities using the 0.4 mg conversion factor. The circuit court ruled that ". . . Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level." The court noted that the only reported decision was decided by the Middle District Court of Tennessee in United States v. Jordan, 842 F. Supp. 1031 (M.D. Tenn. 1994). The circuit court noted that the district court in Jordan had correctly recognized that plain language of the amendment authorizes the use of "LSD alone" in cases involving liquid LSD. The circuit court further noted that the intent of the amendment was to "remove sentencing disparities based on the varied weight of LSD carrier media and to harmonize the sentences for LSD distribution with the sentences for offenses involving more dangerous controlled substances, such as PCP." The circuit court further noted that Amendment 488 does not contravene the Supreme Court's holding in Chapman v. United States, 500 U.S. 453 (1991), that the weight of LSD carrier media should be included in determining the appropriate sentence under 21 U.S.C. § 841(b)(1), because the Supreme Court did not address the proper determination of the weight of LSD when the transactions involve liquid LSD.

Crack — 100:1 Ratio

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The term "cocaine base" as used in §2D1.1 was not unconstitutionally vague and the 100:1 sentencing ratio of cocaine base to powder cocaine under 21 U.S.C. § 841(b) did not violate the equal protection clause. *See* United States v. Thomas, 900 F.2d 37 (4th Cir. 1990); United States v. Bynum, 3 F.3d 769 (4th Cir. 1993); United States v. Pinto, 905 F.2d 47 (4th Cir. 1990). In addition, the 100:1 ratio did not constitute racial genocide in violation of 18 U.S.C. § 1901, as Congress did not establish it with the "specific intent" of "destroying" any racial or ethnic group.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

See United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 457 (1994), §1B1.2, p. 1.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit

United States v. Achiekwelu, 112 F.3d 747 (4th Cir.), *cert. denied*, 118 S. Ct. 250 (1997). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2F1.1(b)(3)(A) on the ground that the defendant misrepresented that he was acting on behalf of a government agency. The defendant lured his victim to Nigeria, introduced him to several people claiming to be Nigerian government officials, took him to an office building that he claimed to be the Central Bank of Nigeria, prepared false government documents to arrange for the transfer of the victim's funds, and defrauded his victim of approximately $4 million. Previous cases have only

interpreted USSG §2F1.1(b)(3)(A) where the defendant misrepresented that he was acting on behalf of a domestic government agency, rather than a foreign government agency. The circuit court stated that the unambiguous language of a guideline must be followed unless there is a manifestation of contrary intent. In this case, the defendant misrepresented that he worked for the Nigerian Finance Ministry, which is a "government agency." The court stated that, standing alone, "government," as used in USSG §2F1.1(b)(3)(A), extends to both domestic and foreign government agencies. In reaching this conclusion, the circuit court stated that the guideline's language does not limit its applicability only to domestic government agencies and the guideline's commentary does not manifest a contrary intent to the guideline's plain language.

United States v. Adam, 70 F.3d 776 (4th Cir. 1995). The defendant, a medical doctor, was convicted under 42 U.S.C. § 1320a-7b(b) (1988) for receiving kickbacks from another doctor in a scheme to defraud Medicare. The appellate court applied the *de novo* standard of review in considering the loss calculation performed by the district court using guideline §2F1.1. Commentary 8 to that guideline states that "[t]he offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss." The defendant argued that the court should look to United States v. Chatterji, 46 F.3d 1336, 1340 (4th Cir. 1995), wherein the defendant's gain could not be used as a substitute for loss because no economic loss was established. The appellate court held that in the defendant's case, the amount of his gain "seems like a highly appropriate measure of the loss suffered by the American taxpayers . . . dollars that were needlessly drained from the Medicare system." The court found Chatterji distinguishable and affirmed the district court's loss calculation.

United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995). The district court erred in determining the economic loss attributable to the defendant pursuant to USSG §2F1.1. The district court used the defendant's gross sales of some $13.4 million as the economic "loss" caused by the defendant's regulatory fraud, resulting in an 11-level increase in his base offense level. The defendant, co-owner of a pharmaceutical company, submitted a drug application for FDA approval which was deficient, in that it purported to contain records for three batches of a drug when it was based on only one acceptable batch. In addition, after obtaining manufacturing and marketing approval from the FDA for a different drug, the defendant slightly modified the formula to increase its shelf life. There was no dispute that the safety and therapeutic value of the drugs was not affected by these deficiencies in meeting FDA requirements. The appellate court rejected the government's argument that loss under §2F1.1 should be measured by the defendant's gain from the sale of the drugs. Instead, the appellate court held that no quantifiable loss can be attributed to the defendant's conduct, because the drug possessed FDA approval, posed no threat to the health and well-being of the consumer, and met all of the goals of FDA requirements for safety and efficiency. The case was remanded for resentencing.

United States v. Dozie, 27 F.3d 95 (4th Cir. 1994). The circuit court rejected the government's argument that in determining loss under guideline §2F1.1, the district court should have used the face amount of the false insurance claims. The circuits are split on how "loss" should be determined. Despite the Fifth Circuit's concordance with the government, *see* United States v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992), this circuit defines "probable loss" as

loss that reflects "economic reality." Because insurance claims are frequently inflated, the face value of the claim does not always reflect economic reality and should therefore not always be utilized to calculate the amount of "loss." The sentence was affirmed. The decision rests, however, on application note 7's former reference to “probable or intended loss.” The term “probable” was deleted effective November 1, 1991, by Amendment 393.

United States v. Henoud, 81 F.3d 484 (4th Cir. 1996). The circuit court affirmed the district court's determination of loss under USSG §2F1.1(b)(1) and found no abuse of discretion in its calculations of the restitution award. The defendant challenged the restitution order as to the victims named and the amount awarded, claiming that the order improperly required him to pay to certain companies not named in the indictment an amount in excess of that alleged in the indictment. Under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663, 3664, a district court may order a convicted criminal to pay restitution to "any victim" of his offense. Determination of the amount of restitution to be paid is typically calculated by the amount of loss sustained by the victim. Additionally, the award must be limited to the losses caused by the specific conduct of which the defendant was convicted; it cannot include unrelated losses. Hughey v. United States, 495 U.S. 411, 413, 110 S. Ct. 1979 (1990). The circuit court held that the district court was within its statutory authority with respect to the amount awarded and that it correctly adopted the broader definition of "victim" as "a party directly harmed by the defendant's criminal conduct in the course of a scheme or conspiracy" for purposes of restitution. In a scheme, the harm need only be a direct result of the defendant's criminal conduct, through or "closely related to" the scheme, conspiracy or pattern. The government proved that a scheme to defraud existed, in addition to proving specific incidents of fraud perpetuated on individual long distance companies. Therefore, the district court's inclusion of all losses to any victim caused by the scheme to defraud was not improper or in excess.

United States v. Loayza, 107 F.3d 257 (4th Cir. 1997). In a case of first impression, the district court correctly interpreted the guideline definition for "loss" and based the defendant's sentence upon the total value of funds taken from investors without subtracting for periodic payment of "interest." The facts of this case were such that the defendant devised a Ponzi-type scheme and encouraged individuals to invest in his investment management company, the funds from which would then be invested in reputable mutual funds. Periodically, defendant used funds from new investors to make "interest payments" to earlier investors in an effort to avoid detection. The defendant argued for a calculation of loss which reflects a deduction of "interest" payments made to investors, in keeping with the definition of loss as "the value of the property taken, damaged or destroyed." USSG §2F1.1, note 7. The government argued for a calculation of loss equivalent to intended loss, because the guidelines provide that "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." USSG §2F1.1. The circuit court rejected the defendant's net loss argument and aligned itself with the Second Circuit in adopting the intended "loss" calculation in similar cases. United States v. Mucciante, 21 F.3d 1228 (2d Cir. 1994). The court specifically noted that an approach which holds a defendant responsible for the entire amount of loss intended is appropriate if the payments facilitate the continued longevity of the scheme. In such cases, the defendant does

not act out of a good faith change of heart or out of concern for returning something of value to his victims.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The defendant worked as one of two group leaders in Sales Audit Department at Woodward and Lothrop Department Stores. She held this position for ten years. The defendant used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The district court enhanced the defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argues that the enhancement was unwarranted because her position does not fall within the definition of "public or private trust." The defendant relies on United States v. Helton, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position is functionally equivalent to an ordinary bank teller. The district court rejected defendant's argument and distinguished Helton. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in Helton did not require any special access. The appeals court affirmed the district courts conclusions and the 2-level enhancement.

United States v. Marcus, 82 F.3d 606 (4th Cir. 1996). The defendant appealed the district court's decision on remand, affirming its prior sentence. On remand, the district court considered its finding of loss in light of the Fourth Circuit's decision in United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), and reaffirmed the original sentence. The defendant, president and chief executive officer of a company that manufactured generic drugs, had pleaded guilty to one count of conspiracy to defraud the United States, 18 U.S.C. § 371, but reserved the right to contest the calculation of loss under the guidelines at USSG §2F1.1(b)(1). The government asserted that the measure of loss should be the defendant's gross sales, exceeding $10 million, on the theory that the drug had no value because it did not meet FDA specifications. The district court agreed, and assessed the corresponding 15-level enhancement to the base offense level. The resulting guideline range was 41-51 months imprisonment. The defendant asserted that consumers suffered no loss because the drug possessed FDA approval, and the changes it made to the formula did not alter the safety of the drug. The appellate court disagreed, noting that unlike the case in Chatterji, the reason for the modification to the defendant's drug formula was a problem in passing dissolution tests, which bears on the therapeutic value of a time-released drug. The modification to the formula in Chatterji affected shelf life, but had no potential to affect the therapeutic value of the drug. In this case, the defendant conceded that "the modification would have been viewed by the FDA as significant enough to require additional bioequivalence testing." This testing would have been unnecessary if there was no possibility that the change could affect the therapeutic value or safety of the drug. This was the pivotal distinction, and the district court decision was affirmed.

United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997). The district court erred in calculating the government's loss as including both fraudulent and legitimate travel voucher reimbursement requests submitted by the defendant. "Loss," as defined under §2F1.1, is the actual, probable, or intended loss to the victim and is limited to the tangible economic loss suffered by the victim. The circuit court found that loss was not equivalent to the total benefit received by

the defendant because some benefit was rightfully due. In reaching this conclusion, the court rejected the government's argument as to the applicability of 28 U.S.C. § 2514, which authorizes a forfeiture proceeding in the event of a fraudulent claim submission. Firstly, this section is not self-executing and the submission of a false claim does not mandate forfeiture. Secondly, even if the provision were self-executing there is no precedent for treating the entire amount involved in the claims as equivalent to loss. The sentencing court should focus upon actual loss. Therefore, the loss in this case was limited only to the amount fraudulently claimed by the defendant.

United States v. Smith, 29 F.3d 914 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The defendant argued that the district court's determination of the amount of loss sustained in a bank loan fraud case was in error because a 1099A form, submitted by the bank to the IRS at a later date, showed no loss to the bank from the fraud. The circuit court rejected this argument because a 1099A form is generated to reflect the gross transaction amount, which establishes the capital gain or loss on a sale; it does not reflect any loss or gain to the bank at the time the fraud was perpetuated. Therefore, the district court's application of USSG §2F1.1, Note 7(b), which directs the court to consider actual loss, was correct despite the fact that the bank was able to recover this loss at a later date.

See United States v. Walker, 29 F.3d 908 (4th. Cir. 1994), §1B1.3, p. 3.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998). The defendant's convictions on 14 firearms counts, based on 6 guns and ammunition, were unconstitutionally duplicative. The defendant was convicted of seven count under 18 U.S.C. § 922(g)(1) (prohibited possession of a firearm or ammunition by a convicted felon) and seven under §922(g)(3) (prohibited possession of a firearm or ammunition by an illegal drug user). The court of appeals held that while a person must be a member of at least one of the nine classes prohibited from possessing guns under § 922(g), a person who is disqualified from possessing a firearm because of membership in multiple classes does not thereby commit separate and multiple offenses. The offense is determined by performance of the prohibited conduct, not by reason of the defendant's legal status alone. This holding reduced Dunford's number of convictions from fourteen to seven. The court of appeals further held that Dunford's possession of six firearms and ammunition did not constitute seven acts of possession under 18 U.S.C. § 922(g), but rather one. The court reasoned that the statute is not clear as to what conduct is prohibited: possession of any firearm or ammunition could arguably occur every time a person picks up a different firearm; the statutory language does not delineate whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations. Interpreting 18 U.S.C. § 1202(a), the predecessor to § 922(g), the court had held that when a convicted felon acquires two or more firearms in one transaction and stores and possesses them together, he commits only one offense under the statute. *See* United States v. Mullins, 698 F.2d 686 (4th Cir. 1983). Applying that rule, the court held that Dunford's possession of the six

firearms and ammunition, seized at the same time from his house, supports only one conviction under 18 U.S.C. § 922(g).

See United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 119 S. Ct. 568 (1998), §1B1.1, p. 1.

United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court did not err in enhancing the defendant's sentence based on his two prior felony convictions of a "crime of violence" pursuant to USSG §2K2.1(a)(2). The defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He argued that his prior state conviction for involuntary manslaughter was not a "crime of violence" because it was not a specific intent crime and because the catchall phrase of USSG §4B1.2 applies only to crimes against property. The circuit court relied on USSG §4B1.2, application note 2 which specifically includes manslaughter within the definition of a "crime of violence." Although the circuit court acknowledged that the application note does not distinguish between voluntary and involuntary manslaughter, it followed United States v. Springfield, 829 F.2d 860 (9th Cir. 1987), in which the Ninth Circuit held that involuntary manslaughter, by its nature, "involves the death of another person [and] is highly likely to be the result of violence. It thus comes within the intent, if not the precise wording of section 924(c)(3)[(B)]." *Id*. at 863.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

United States v. Hamrick, 43 F.3d 877 (4th Cir.) *cert. denied*, 516 U.S. 825 (1995). The district court did not err in concluding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" in section 924(c)(1) were interchangeable and thus the district court should have imposed the five-year sentence prescribed for use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The circuit court, convening en banc, ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, a "destructive device" is a subset of "firearm," and the statute is unambiguous that use of a destructive device shall be punished by 30 years imprisonment. The circuit court, however, was divided, with two concurring opinions expressing doubt as to whether the dysfunctional bomb was a destructive device, and one dissenting opinion concluding that the bomb was not a "deadly or dangerous weapon" for the purpose of sentence enhancement.

United States v. Williams, 152 F.3d 294 (4th Cir. 1998). The defective indictment charging defendant with “possessing,” rather than “using” or “carrying,” a firearm in connection with a drug trafficking crime under 18 U.S.C. § 924(c) did not amount to plain error. The defendant raised his argument for the first time on appeal; the court of appeals held that, under the more forgiving standard for post-verdict review, the argument fails. The mere failure to track the precise language of the statute does not, without more, constitute error. The imprecision did not render defendant unable to prepare an adequate defense, or to be aware of the charge against him.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Campbell, 94 F.3d 125 (4th Cir.), *cert. denied*, 117 S. Ct. 1847 (1997). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction occurred in 1989 which precipitated the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court disagreed, and relied chiefly on United States v. Garcia-Rico, 46 F.3d 8 (5th Cir. 1995), in holding that the obvious intent of the amendment was to allow the predicated offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. Additionally, the court noted that in considering a sentence under §2L1.2(b)(2), all prior felonies, no matter how ancient, were relevant in the determination of a sentence.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Barton, 32 F.3d 61 (4th Cir. 1994). The defendant pleaded guilty to attempted money laundering. The district court properly rejected the defendant's argument that USSG §2S1.1(b)(2)'s definition of "value of the funds" should be determined by the amount of money actually used in the government sting. Rather, the "value of the funds" is the amount of money the defendant agreed to launder. To hold otherwise would allow the government to affect a sentencing variable simply by adjusting the amount of flash money used, and it would ignore the amount the defendant agreed and intended to launder. The defendant further argued that the three-level increase under USSG §2S1.1 for laundering drug proceeds did not apply to him because the 1989 version of the guideline sanctions only actual knowledge that the money was the result of a drug transaction, not mere belief that the funds were drug proceeds. Although the defendant believed the money was the result of a drug distribution, in reality it was government sting money. The circuits that have addressed this issue have reached different conclusions. The Eleventh Circuit held that mere belief is "sufficient to trigger an enhancement under the 1989 version of the guideline." United States v. Perez, 992 F.2d 295 (11th Cir. 1993). The Fifth Circuit, however, held that actual knowledge of the source of the funds is required. United States v. Breque, 964 F.2d 381 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 1253 (1993). This court, following the holding of the Fifth Circuit, cited a subsequent amendment to the guideline which added the words "or believed," and its stated purpose to reflect the enactment of a new law which addressed defendants caught in government stings, to support its interpretation that the earlier version of the guideline did not sanction "belief."

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Nicolauo, 180 F.3d 565 (4th Cir. 1999). The district court did not err in applying a leadership enhancement after the defendant's related offenses are grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. After grouping the offenses, the district court applied a four-level enhancement for leadership in the organization pursuant to §3B1.1(a). The defendant argued that the role adjustment should have been applied to individual offenses before grouping. The appellate court rejected this reasoning, holding that the law in the Fourth Circuit is clear that a role in the offense adjustment is applied after related offenses are grouped. *See* United States v. Hartzog, 983 F.2d 608 (4th Cir. 1993). Furthermore, the appellate court concluded that defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for, "the money laundering. USSG §1B1.3(a)(1). Without the gambling operation, there would have been no ill-gotten gains to launder. The gambling organization was relevant conduct under §1B1.3(a)(2) because the money laundering counts themselves were grouped based on the amount of money laundered under §3D1.2(d).

§3B1.2 Mitigating Role

See United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 119 S. Ct. 251 (1998), §1B1.8, p. 3.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Akinkoye, 1999 WL 507216 (4th Cir. July 19, 1999). The district court did not err in applying an abuse of trust enhancement, pursuant to §3B1.3. The defendant, a real estate agent, used client's financial information to obtain credit cards. He would then access the victim's mail by using keys to the home provided by the client. The defendant contended that real estate agents do not occupy a position of trust, or in the alternative, that the only victims were the banks, with whom he held no position of trust. The appellate court rejected the defendant's argument, noting that in the Fourth Circuit, a mechanistic approach to the abuse of trust departure that excludes defendants from consideration based on their job titles has been rejected. See United States v. Gordon, 61 F.3d 263 (4th Cir. 1995). The appellate court noted that several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant had either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The appellate court stated that in reviewing the factors to the defendant's case, the district court did not err in determining that the defendant held a position of trust. First,

the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The defendant worked as one of two group leaders in Sales Audit Department at Woodward and Lothrop Department Stores. She held this position for ten years. The defendant used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The district court enhanced the defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argued that the enhancement was unwarranted because her position does not fall within the definition of "public or private trust." The defendant relies on United States v. Helton, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position is functionally equivalent to an ordinary bank teller. The district court rejected defendant's argument and distinguished Helton. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in Helton did not require any special access. The appeals court affirmed the district courts conclusions and the two-level enhancement.

See United States v. Moore, 29 F.3d 175 (4th Cir. 1994), §1B1.3, p. 2.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Pitts, 176 F.3d 239 (4th Cir.), *petition for cert. filed*, No. 99-5577 (May 4, 1999). The appellate court upheld the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court determined that the defendant's conduct was not a single course of conduct with a single objective as contemplated by §3D1.2. The appellate court stated that counts which are part of a single course of conduct with a single criminal objective and represent one composite harm to the same victim are to be grouped together. However, if the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual—albeit identical—goal, then the district court should not group the offenses. In the case at bar, the district court properly determined that the counts of conviction did not constitute a single course of conduct with a single objective, and that the counts should not be grouped together. The appellate court noted that the district court carefully considered the undisputed facts that the counts depended upon two separate time periods, involved the supplying of information to two distinct sets of people in two separate locations, and resulted in the passage of an entirely different category of sensitive materials involving separate and distinct instances of harm. Furthermore, the defendant's actions were not connected by a common criminal objective.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence involving mail fraud and money laundering. The district court grouped the counts together pursuant to USSG §3D1.2(d) and applied the higher base offense level for money laundering under USSG §3D1.3(b). Along with other adjustments, the defendant received a four-level specific offense characteristic increase under the money laundering guideline because the fraudulent scheme involved between $600,000 and $1,000,000. The defendant argued that in determining his specific offense characteristic, the district court should have considered only $5,051.01 in fictitious interest payments specifically identified in the money laundering counts of the indictment. The government argued that all of the allegations in the mail fraud counts, which the defendant conceded involved $850,913.59, were incorporated into the money laundering counts by the grand jury. Furthermore, the facts of the case established that the mail fraud and money laundering crimes were interrelated. The Fourth Circuit held that the defendant's money laundering was part of the fraudulent scheme because the funds were used to make fictitious interest payments. The defendant essentially conceded the offenses were closely related when he pleaded guilty to money laundering under the particular provision of the statute that forbids conducting financial transactions involving the proceeds of a specified unlawful activity "with the intent to promote the carrying on of [the] specified unlawful activity." Additionally, the circuit court found that the sentencing guidelines permitted the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline. The court relied on the Eleventh Circuit's decision in United States v. Mullens, 65 F.3d 1560, 1564 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1337 (1996), which held that a court was "required to consider the total amount of funds that it believed was involved in the course of the criminal conduct" when determining the specific offense characteristic under the money laundering statute.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility and for reducing his sentence pursuant to USSG §3E1.1. On appeal, the government argued that the district court improperly adjusted the defendant's sentence based on two grounds, the defendant saved both the court and the government real time in both having to go through with a jury trial, and because the defendant never indicated at trial that he did not accept the fact that he lied. The Fourth Circuit held that the lower court erred in basing the defendant's sentence reduction on those two factors. The guidelines make no distinction between a bench and a jury trial. The relevant distinction is between a defendant who puts the government to its burden of proof at trial and a defendant who does not request a trial. *See* USSG §3E1.1, Comment 2. Additionally, the circuit court found that, at least in part, the defendant went to trial to attempt to prove that his lies to the grand jury were not "material." Because materiality is an essential element of any perjury offense, in asserting his lies were not "material," the defendant challenged his "factual guilt." For these reasons, the defendant did put the government to its burden and, therefore, the defendant was not entitled to an acceptance of responsibility reduction.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to USSG §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor reincarceration. The defendant pleaded guilty to being a felon in possession of a firearm in 1992. In 1983 he had been convicted of armed robbery in the state of Maryland, and was paroled after serving five years of his nine-year sentence. The state issued a warrant for his arrest for burglary and trespass eight months after his release, but it was not served until 1992, four years after the alleged parole violations and almost a year after the expiration of the parole period. The defendant was held in detention for 24 days pending his parole revocation hearing. Although he was found guilty of the parole violations, the Parole Commission did not revoke parole or reimpose a sentence, and he was released. The federal district court added two points to the defendant's criminal history pursuant to §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed USSG §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. The circuit court ruled that there was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, particularly since the defendant's parole was not revoked and the defendant was not reincarcerated. The circuit court further held that USSG §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of defendants who are awaiting parole revocation hearings when those hearings do not result in reincarceration or revocation of parole." The appellate court vacated the sentence and remanded the case for resentencing.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court erred in relying upon defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and in refusing to enhance defendant's sentence as required under USSG §4B1.1. The court held that the district court was required to count the previous state offense as a predicate offense because the defendant did not allege that he was deprived of counsel or any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under USSG §4A1.2, Application Note 6 to this section requires the conviction to be considered unless it has been reversed, vacated or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack.

The court noted that 28 U.S.C. § 994 was enacted to ensure that career offenders received sentences near the maximum term authorized by law and omitted any authority for collateral attacks under this provision. Therefore, the legislature did not intend to give career offenders the right of collateral attack on their prior convictions for the purpose of sentence enhancement. The court concluded that this particular defendant lacked authority for his collateral attack. As a policy matter, unrestricted challenges to predicate offenses would place a substantial burden upon prosecutors forced to defend the predicate offenses and judges forced to hear the appeals. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

United States v. Johnson, 114 F.3d 435 (4th Cir.), *cert. denied*, 118 S. Ct. 257 (1997). For career offender calculation purposes, the date the prior conviction was sustained should control, not the date of later sentencing as a career offender. The defendant argued that the district court's sentencing of him as a career offender based on his prior conviction for assault on a female, which at the time of the defendant's conviction carried a maximum penalty of two years, could not be used in the career offender analysis because that offense now carries only a 150-day maximum. The defendant argued that North Carolina's recent amendment rendered his prior conviction ineligible for career offender calculations. As a case of first impression for the federal courts, the Fourth Circuit held that the date of the conviction pursuant to USSG §4B1.2(3) of the guidelines provides that the conviction is sustained on the date the guilt of the defendant is established. The defendant sustained his conviction for assault on a female in 1986. In 1986, that offense was punishable by a statutory maximum of two years. Thus, the assault conviction was properly considered a prior felony conviction for guideline purposes.

United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). In addressing an issue of first impression, the Fourth Circuit reversed the district court's finding that the defendant's instant offense of conspiracy to distribute cocaine did not qualify as a controlled substance offense for career offender purposes. The Fourth Circuit joined the Third, Seventh, Eighth, and Ninth Circuits in concluding that 28 U.S.C. § 994(h) was not the sole source of authority for USSG §4B1.1, rather, the career offender guideline was promulgated pursuant to the Commission's general authority under section 994(a) as well as the specific mandate under section 994(h). *See* United States v. Heim, 15 F.3d 830 (9th Cir. 1994); United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Hightower, 25 F.3d 182 (3d Cir. 1994); *but see* United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993); United States v. Bellazerius, 24 F.3d 698 (5th Cir. 1994).

United States v. Neal, 27 F.3d 90 (4th Cir. 1994). In considering an issue of first impression in the federal courts, the appellate court reversed the district court's sentencing calculation, counting a New York state drug possession conviction under §4B1.1, the career offender guideline. Section 4B1.1 requires the defendant to have at least two prior felony convictions for a crime of violence or a controlled substance offense. This court joins the Ninth, Fifth, Tenth and Eleventh Circuits in recognizing that simple possession of drugs is not considered a "controlled substance offense." The New York statute under which the defendant was convicted only requires an intent to distribute for one section of the statute; the other sections pertain to

simple possession. Because it is unclear which section of the statute applied to the defendant's convictions, it was improper for the court to count this conviction for purposes of applying the career offender guideline.

United States v. Williams, 29 F.3d 172 (4th Cir. 1994). The district court erred in classifying the defendant as a career offender pursuant to USSG §4B1.1. The defendant was involved in and pleaded guilty to a cocaine distribution conspiracy that existed between 1988 and 1989. The district court determined he was a career offender and used as predicate offenses the defendant's convictions for second degree burglary, imposed in September 1991, and attempted burglary, imposed in October 1991. He argued that the predicate offenses were not "prior felony convictions" because they occurred subsequent to the instant offense. The circuit court agreed and held that "convictions sustained subsequent to the conduct forming the basis for the offense at issue cannot be used to enhance a defendant's status to career offender." *See* United States v. Bassil, 932 F.2d 342 (4th Cir. 1991).

§4B1.2 Definitions of Terms Used in Section 4B1.1

See United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994), §2K2.1, p. 11.

§4B1.4 Armed Career Criminal

United States v. Cook, 26 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 953 (1994). The district court erred in concluding that "obstruction of justice" cannot serve as a predicate offense under the Armed Career Criminal Act when the applicable state law broadly defines it to include violent and nonviolent means. The Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), held that the district court may examine the "indictment or information and jury instructions" to determine whether the burglary for which the jury convicted the defendant was violent. In following the majority of courts of appeals, this court agreed that Taylor is not restricted to burglary offenses and may be applied to all predicate convictions. *See* United States v. Mendez, 992 F.2d 1488 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 262 (1993); United States v. Harris, 964 F.2d 1234 (1st Cir. 1992); Lowe v. United States, 923 F.2d 528 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2066 (1991).

United States v. Letterlough, 63 F.3d 332 (4th Cir.), *cert. denied*, 516 U.S. 955 (1995). The appellate court affirmed the district court's enhancement of the defendant's sentence under the provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The defendant pleaded guilty to being a felon in possession of a firearm, and was sentenced to 84 months imprisonment and five years supervised release. On appeal the defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on July 31, 1990, to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense, noting that Congress intended to include within the scope of the ACCA only those predicate offenses that constitute an

occurrence unto themselves. The circuit court recognized and adopted the test applied by the majority of the circuit courts to determine whether the ACCA applies to a defendant's prior crimes: convictions occur on occasions different from one another "if each of the prior convictions arose out of a `separate and distinct criminal episode.'" United States v. Hudspeth, 42 F.3d 1015, 1019 (7th Cir. 1994) (*en banc*) (collecting cases) (emphasis in original) (citation omitted), *cert. denied*, 115 S. Ct. 2252 (1995). The circuit courts have applied a number of factors to determine when more than one conviction constitutes a separate and distinct criminal episode, including "whether the offenses arose in different geographic locations; whether the nature of the offenses was substantively different; and whether the offenses involved multiple victims and multiple criminal objectives." The circuit court found the Fifth Circuit's decision in United States v. Washington, 898 F.2d 439 (5th Cir.), *cert. denied*, 498 U.S. 842 (1990), to be particularly instructive because of its similar facts. In Washington, the defendant robbed a convenience store and returned to the very same store within a few hours and robbed it again. The Fifth Circuit affirmed the district court's enhancement decision, holding that "where multiple offenses are not part of a continuous course of conduct, they cannot be said to constitute either a criminal spree or a single criminal transaction for purposes of section 924(e)." *Id*. at 441. The circuit court ruled that likewise Letterlough's two convictions did not arise from a continuous course of criminal conduct, but instead constituted two complete and discrete commercial transactions and, therefore two separate and distinct episodes.

United States v. O'Neal, 180 F.3d 115 (4th Cir 1999). The district court did not err in sentencing the defendant as an armed career criminal under 18 U.S.C. § 924(e) and USSG §4B1.4. The district court relied on a 1977 North Carolina felony larceny conviction. The defendant argued that the conviction should not count because the government did not include the conviction in the notice it filed with the district court of its intent to seek an enhanced sentence. The appellate court concluded that the presentence report gave the defendant adequate notice that the 1977 conviction was a possible predicate conviction. The appellate court stated that there is no requirement that the government list, either in the indictment or "in some formal notice" the predicate convictions on which it will rely for a section 924(e) enhancement. *See* United States v. Alvarez, 972 F.2d 1000 (9th Cir. 1992). The appellate court added that although the defendant has a right to adequate notice of the government's plan to seek such an enhancement, the listing of these convictions in the presentence report is more than adequate to provide such notice. Because the presentence report explicitly relied on the 1977 conviction as a possible predicate for subjecting the defendant to an enhanced sentence, the defendant adequate notice.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4 Recommended Conditions of Probation and Supervised Release (Policy Statement)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering the defendant to abstain from alcohol as a condition of supervised release. Pointing to United States v. Pendergast, 979 F.2d 1289 (8th Cir. 1992), the defendant contended that this condition deprived him of his liberty and freedom, and was not "fine tuned" as such restrictions on freedom should be. The circuit court distinguished this case, however, by indicating that the defendant in Pendergast did not have a history of alcohol abuse, while the defendant in this case has prior convictions for alcohol related offenses and had tested positive for drugs on various occasions. The circuit court joined with the First and Ninth Circuits in holding that this condition of supervised release was acceptable under such circumstances.

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Ivester, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court found that the defendant had failed to provide the government with any truthful information concerning his crime. The defendant contends that he is entitled to the departure because he would have provided truthful information to the government had it asked for any. On appeal, the defendant raised an issue of statutory construction that had not been decided by any circuit court: whether pursuant to section 3553(f), defendants are required to affirmatively act to inform the government of their crimes, or whether it is sufficient that they are willing to be completely truthful. Although noting that a defendant cannot be denied section 3553(f) relief merely because of the uselessness of the information provided to the government, the court determined that granting a section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under USSG §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.2 Fines for Individual Defendants

United States v. Blake, 81 F.3d 498 (4th Cir. 1996). The district court erred in ordering the defendant to pay restitution to the persons from whom he stole credit cards. The defendant pleaded guilty to one count of fraudulent use of unauthorized access devices in violation of

18 U.S.C. § 1029(a)(2). At sentencing the district court ordered the defendant to pay restitution to the persons from whom he stole the credit cards. On appeal, the defendant argued that because the persons from whom he stole the credit cards are not victims of his offense of conviction, their losses should not have been included in the restitution order. The Fourth Circuit agreed. Although noting that the Victim and Witness Protection Act ("VWPA") was amended to define "victim" as any person directly harmed by the defendant's criminal conduct, that new definition only applies if the offense involves "as an element" a scheme.

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995). The government challenged the district court's decision not to impose a fine on the defendant under guideline §5E1.2. The Fourth Circuit held that the district court must determine whether the defendant has proved his present and prospective inability to pay a fine, and remanded the case for reconsideration of the defendant's financial situation. The appellate court relied on §5E1.2(a) which states, "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The appellate court stated that "the defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The district court did not abuse its discretion in imposing a $300,000 fine. The defendant refused to complete a personal financial statement for the presentence report and provided no evidence to show an inability to pay. The defendant bears the burden of demonstrating his present and future inability to pay. United States v. Hairston, 46 F.3d 361, 367 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995).

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply USSG §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995). The district court erred in not attempting to come within the defendant's combined guideline range as prescribed in USSG §5G1.3(c). If the defendant's crimes had all been prosecuted federally, his sentencing range would have been 262 to 327 months. The defendant's guideline range for the instant offense was 108 to 150 months. The court departed upwardly to the statutory maximum of 25 years, or 300 months, and ordered the sentence to run consecutively to the 40 years, or 480 months, the defendant had already been ordered to serve in state prison. The final sentence of 780 months exceeded the upper end of the defendant's hypothetical combined guideline range by 453 months (*i.e.*, almost 38 years). The circuit court remanded with instructions to recalculate the defendant's sentence in

accordance with USSG §5G1.3. The circuit court noted that if the district court on remand should decide to use a method other than that outlined in USSG §5G1.3 for calculating the defendant's sentence, it must explain its reasons for doing so. United States v. Stewart, 59 F.3d 496, 498 (4th Cir. 1995).

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. The defendant unsuccessfully argued to have the present sentence run concurrently with his 1988 PCP sentence. Under USSG §5G1.3(c), the court must attempt to calculate the reasonable incremental punishment . . . under the commentary methodology, but may use another method if there is a reason to abandon the suggested penalty. In addition, the circuit court noted that Application Note 5 of USSG §7B1.3 states: ". . . any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant." The circuit court found that although the district court did not specifically state that it was applying either USSG §5G1.3(c) or §7B1.3, its reasoning indicates that the appropriate factors were considered under the relevant guidelines. Furthermore, the district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court erred in relying upon Application Note 5 of §5G1.3 to impose the statutory maximum term for solicitation on the defendant. The court of appeals held that the district court erroneously interpreted Note 5 to allow the imposition of the statutory maximum. Note 5, however, simply addresses the imposition of concurrent or consecutive terms of imprisonment when the defendant is faced with numerous terms of undischarged prison time. Nothing in Note 5 allows the district court to depart from the applicable guideline range. The court of appeals remanded for resentencing on this count.

Part H Specific Offender Characteristics

§5H1.6 Family Ties and Responsibilities

United States v. Wilson, 114 F.3d 429 (4th Cir. 1997). The district court abused its discretion in departing downward from the applicable guideline range. The defendant pled guilty to conspiracy to possess with the intent to distribute cocaine base. The district court held that the defendant was not entitled to a reduction in his sentence under USSG §2D1.1(b)(4) because the defendant had failed to carry his burden of demonstrating that the firearms he admitted to possessing were not possessed in connection with the conspiracy. The district court, however, did depart downward from the resulting guideline range because of the defendant's extraordinary family responsibilities. The government appealed, arguing that the district court abused its discretion in granting the downward departure. The circuit court applied the analysis of Koon v. United States, 116 S. Ct. 2035, 2044 (1996), and agreed and held that a fair review of the proceedings before the district court demonstrated that the defendant's deprived background was a

motivating force behind the decision of the district court to depart. The district court, recognizing that USSG §5H1.12 prohibited a departure based on disadvantaged upbringing, attempted to justify the departure USSG §5H1.6, based on family ties and the defendant's ability to take care of his own children. The circuit court found that the defendant's family circumstances were not so extraordinary as to justify the departure. The circuit court found that the district court improperly departed, and vacated the sentence and remanded for resentencing.

Part K Departures

Standard of Appellate Review — Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Brock, 108 F.3d 31 (4th Cir. 1997). The district court erred in finding that it lacked the authority to consider a departure. At sentencing, the defendant sought a departure based on his post-offense rehabilitation efforts. The district court held that a departure was not authorized based on the circuit's prior ruling in United States v. Van Dyke, 895 F.2d 984 (4th Cir. 1990), that held that such rehabilitation efforts may not be used as a basis for a downward departure because the guidelines took such conduct into account. *See* USSG §3E1.1, comment. (n.1(g)) (stating that post-offense rehabilitation efforts should be taken into consideration in determining whether to grant acceptance of responsibility adjustment). The circuit court found that based on the analysis set forth in Koon v. United States, 116 S. Ct. 2035 (1996), post-offense rehabilitation efforts could form a proper basis for downward departure. Noting that post-offense rehabilitation efforts are taken into account in acceptance of responsibility determinations, the Court stated that such efforts could be a basis for a departure only "when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

United States v. Hill, 70 F.3d 321 (4th Cir. 1995). The defendant appealed the extent of the downward departure based on his substantial assistance to the government. He asserted that the district court's decision to reduce his base offense level by only two levels was based on its erroneous consideration of a prison term imposed on him by the district court in Texas. The appellate court concluded that the sentence did not result from an incorrect application of the guidelines, and the appeal was an artful attempt to gain review of the district court's exercise of discretion. As such, the appeal was dismissed.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The circuit court did not err in refusing defendant's request to depart downward under USSG §5K1.1 based on the defendant's "substantial assistance" in order to enforce his plea agreement with the government. A court may not grant such a departure without a government motion unless 1) the government obligated itself in the plea agreement or 2) the refusal to make the motion was based on an unconstitutional motive. The plea agreement provided the government with the discretion to make such a motion if it determined it was warranted, but did not impose a binding obligation to do so. Nor was the refusal to move for departure based on unconstitutional racial bias. The only

support for this claim offered by the defendant was the allegation that the same United States Attorney's office recently moved for downward departure on behalf of several middle class white defendants convicted of comparable drug offenses. The circuit court held that this alone was not sufficient to reach judicial inquiry under United States v. Wade, 112 S. Ct. 1840 (1992) (defendant must make a "substantial threshold showing" of unconstitutional motive).

§5K2.0 Grounds for Departure (Policy Statement)

See United States v. Achiekwelu, 112 F.3d 747 (4th Cir.), *cert. denied*, 118 S. Ct. 250 (1997), §2F1.1, p. 6.

United States v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 240 (1997). The district court properly departed upward from the standard guideline sentence for kidnapping. The district court found four aggravating factors which it used to justify the upward departures and the defendant's increased sentence including §§5K2.2 (physical injury), 5K2.8 (extreme conduct), 5K2.5 (property damage), and 5K2.4 (abduction or unlawful restraint). The defendant argued that the extent of the departures made by the district court were unreasonable because certain facts the district court relied upon were erroneous. The defendant objected to the consideration of §5K2.2 as a ground for departure because §2A4.1(b)(2) of the guidelines under kidnapping provides for a four-level increase if the victim sustained permanent or life-threatening bodily injury. The Fourth Circuit, applying the standard of review established by the Supreme Court in Koon v. United States, 116 S. Ct. 2035 (1996), rejected this argument and held that the extent of the upward departure should ordinarily depend on the extent of the injury, the degree to which it may prove to be permanent, and the extent to which the injury was intended. When the victim suffers a major permanent disability, and when such an injury was intentionally inflicted, a substantial departure may be appropriate. Similarly, the defendant objected to the use of USSG §5K2.4 because the crimes of kidnapping and domestic violence contain the elements of abduction and unlawful restraint and thus, an additional departure would not be authorized. The circuit court held that because of the egregious nature of the restraint in this case, being held captive in the trunk of a car for an extended period of time, a departure based on USSG §§5K2.2 and 5K2.5 was completely reasonable. Additionally, the defendant argued that a departure under USSG §5K2.5 was erroneous because the four-level adjustment for a permanent or life-threatening bodily injury mentioned in USSG §2A4.1(b)(2) obviated the use of USSG §5K2.5 because in every case involving serious injury, there will always be significant medical expenses. The district court rejected this argument and held that the district court correctly referred to USSG §5K2.5 due to the massive future medical expenses involved. Lastly, the defendant argued that the use of USSG §5K2.8 was unwarranted because the facts underlying the finding of extreme conduct were erroneous. The Circuit Court rejected this argument, holding that even in the light most favorable to the defendant, the defendant's conduct was intentionally brutish, cruel, and extreme.

United States v. Fenner,147 F.3d 360 (4th Cir.), *cert. denied*, 119 S. Ct. 568 (1998). The district court properly concluded it could not base a downward departure on the increase in sentencing range that resulted from application of a cross-reference. The defendants had been charged with and acquitted of the murder of a co-conspirator in a drug distribution conspiracy.

They were later convicted on federal drug and firearms charges. At sentencing, the district court found that they were responsible for the murder and applied the cross-reference to the homicide guidelines contained in §2K2.1(c)(1)(B). The district court ruled that although application of the cross- reference resulted in rather large enhancements of the guideline ranges, it lacked authority to depart downward. The defendants argued that under Koon v. United States, 518 U.S. 81 (1996), enhancement of a sentencing range through application of a cross-reference is not a prohibited basis for departure, therefore the district court possesses the authority to depart on that basis. The court of appeals viewed the enhancement resulting from application of a cross-reference as an unmentioned departure factor, and went on to determine whether the enhancement is taken into account within the heartland of the applicable guidelines. The language of the cross-reference plainly indicates that when a firearm is illegally possessed in connection with another offense from which death results, the sentencing court must enhance the defendant's sentence in accordance with the homicide guidelines if that sentence is greater than that calculated without reference to the homicide guidelines. Thus the guidelines take into account that the application of the cross-reference will result in an enhanced guideline range.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 519 U.S. 114 (1997). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank she had embezzled $250,000 to settle her civil liability. The district court determined that her efforts merited a five-level departure for "extraordinary restitution." The government appealed, arguing that the defendant's restitution was not "extraordinary." The circuit court stated that the standard of review for departure cases is now a "unitary abuse of discretion standard." Koon v. United States, 116 S. Ct. 2035 (1996). The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. *See* United States v. Hendrickson, 22 F.3d 170 (7th Cir.), *cert. denied*, 115 S. Ct. 209 (1994). Here, the court found that the defendant's restitution was not extraordinary as it equaled less than half the amount she embezzled and came not from her funds, but from the generosity of friends. Therefore, when compared to the efforts of defendant's in other cases, the district court abused its discretion in finding that the circumstances merited departure.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995). The defendants pleaded guilty to carjacking and use of a firearm. They repeatedly beat and raped their victim. The district court departed upward based on the "extensive psychological effect" of the crime on the victim, USSG §5K2.3, the extreme conduct in inflicting gratuitous pain, USSG §5K2.8, and the physical injury to the victim, USSG §5K2.2. The appellate court agreed with the defendants that the district court erred in departing for physical injury because it was taken into account under USSG §2B3.1(b)(3)(C) in determining the guideline range, and the district court made no finding that that adjustment was not sufficient. However, the appellate court was convinced that the district court's reliance on this ground did not affect the sentence imposed. The "reliance on physical harm as a factor in the upward departure decision was harmless."

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). The district court erred in granting a downward departure to the defendant. At sentencing, the defendant was granted a downward departure, from the applicable guidelines range of 292 months to 240 months, based on three justifications: comparatively lenient treatment of similarly culpable co-defendants; unwarranted racial disparity in sentencing stemming from the fact that most of the co-defendants are white and the defendant is black; and a shorter sentence more accurately reflects the defendant's relative culpability. The Government appealed the departure. Disparate sentences among co-defendants is not a permissible ground for departure. *See* United States v. Withers, 100 F.3d 1142, 1149 n.3 (noting unanimous agreement that such departures are impermissible among circuits which have addressed the issue). With respect to the racial disparity claim, the circuit court stated that race can never be a basis for a departure. United States v. Rybicki, 96 F.3d 754, 757 (4th Cir. 1996); USSG §5H1.10. As for a departure based on "relative culpability," the circuit court dismissed this argument stating that such departures would circumvent the district court's factual determinations. The sentence was vacated and the case was remanded to the district court for resentencing within the applicable guideline range.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *petition for cert. filed,* No. 99-5577 (May 4, 1999). The district court did not err in departing upward one level based upon the district court's finding that the defendant's abuse of trust was extraordinary. The defendant was an FBI agent who sold confidential information to Russia. The district court applied the two-level abuse of trust enhancement pursuant to §3B1.3, and then departed upward one level for extraordinary abuse of trust. The defendant appealed the upward departure, arguing that because he was no more culpable than other counterintelligence or supervisory agents who hold similar positions and who may also commit crimes, a departure was unwarranted. The appellate court stated that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement. Here, the level of trust placed in the defendant was unmatched. He was a supervisory special agent of the FBI and a foreign counterintelligence operative whose job was to thwart the espionage activities of the very foreign intelligence service with whom he conspired. In violating, that "awesome responsibility and trust," the defendant violated a level of trust to which most men are never exposed. The defendant presented several other espionage cases where more ham followed in which the sentencing court did not depart based upon abuse of trust. The appellate court rejected this reasoning, concluding that the harm resulting from the actual offense is irrelevant to a decision to depart based upon an extraordinary abuse of trust. The relevant harm is the harm created by the violation of trust.

United States v. Rybicki, 96 F.3d 754 (4th Cir.), *cert. granted, judgment vacated,* 518 U.S. 1014 (1996). The Fourth Circuit, using a five- part test, found that none of the six factors underlying the district court's decision justified a departure and, thus, concluded that the district court abused its discretion in granting a five-level departure. The district court had departed downward based on a combination of factors, and the government appealed the departure. The circuit court prescribed the following analysis for sentencing courts to follow when deciding whether to depart, and clarified the standards for review of departure decisions: 1) The district

court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed for clear error. 2) The district court must decide if the circumstances appear "atypical" and potentially take the case out of the heartland. This is purely analytical and never subject to appellate review. 3) The district court must classify each factor as "forbidden, encouraged, discouraged, or unmentioned." This is a matter of guideline interpretation and reviewed de novo in the context of the ultimate review for abuse of discretion. 4) Factors that are "encouraged, discouraged, or unmentioned" require further analysis. Encouraged factors, if not taken into account by the guidelines, are usually appropriate bases for departure. Discouraged factors are an appropriate basis for departure only in exceptional cases. Unmentioned factors may justify a departure if the factor takes the case outside the guideline's heartland. 5) The district court must consider whether the circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure is warranted. The circuit court, relying on this analysis, held that none of the factors underlying the district court's decision justified a departure and concluded that the court abused its discretion in granting a five-level departure. The court held: 1) defendant's alcohol problem was a forbidden basis for downward departure; 2) defendant's 20 years of unblemished service to the United States, nor responsibilities to his wife and son, who had medical problems, provided bases for a departure downward; 3) district court committed legal error when it departed downward on the ground that the defendant did not commit serious fraud; 4) determination that all law officers suffer disproportionate problems when incarcerated was not proper basis for departure; and 5) finding that the defendant's status as a convicted felon was sufficient punishment was not proper basis for downward departure.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The district court erred in departing downward based on the defendant's exposure to civil forfeiture. The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was to pay restitution of $545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over $600,000 which was credited against the restitution in the plea agreement. The district court departed downward under USSG §5K2.0 because the defendant had payed a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. The court noted that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

§5K2.1 Death (Policy Statement)

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). On appeal by the government, the appellate court vacated the defendant's sentence after a finding that the lower court erred in granting the defendant a departure based on impermissible factors. The defendant argued that his departures were warranted because of the cocaine and crack sentencing disparity in the United States sentencing guidelines and the fact that his white codefendants received lower sentences. The appellate court disagreed, and held that a district court cannot depart from an applicable guideline range based on its own sense of justice. Applying the abuse of discretion standard set forth in Koon v. United States, 116 S. Ct. 2035 (1996), the appellate court held that under the law of the Fourth Circuit, disparate sentences among codefendants was not a viable ground for departure. Similarly, racial disparity in sentencing and relative culpability were simply different ways of justifying the district court's desire to equate the defendant's sentence with those of his codefendants. It was determined by the lower court that the defendant was actually the leader of the drug selling enterprise. Ultimately, these factors contributed to the defendant's total offense level and aided in the judge's determination of the applicable guideline range. The appellate court further noted that departures based on relative culpability would allow district courts to ignore their own factual determinations.

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The district court abused its discretion by departing upward four levels in determining the defendant's sentence for two counts of reckless involuntary manslaughter and an additional uncharged death. The circuit court held that the additional uncharged death of a participant in the aggressive driving could provide a basis for upward departure, even though that victim had been "an active participant in the activity that resulted in his death." However, the sentencing court erred by failing to make additional findings of fact to support the extent of the departure. The court noted that the defendant would have received a one-level increase for the third death under the sentencing guidelines' grouping rules. *See* USSG §3D1.4. The guidelines provide that the extent of an upward departure for death "should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." The circuit court noted that the sentencing court failed to make findings as to the defendant's state of mind. "Accordingly, the extent of the district court's departure turns on whether the recklessness exhibited by Terry was adequate to establish the existence of malice. Because the district court made no such findings, we remand."

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court did not err in departing upward based on the murder of the victim in a kidnaping case. The court of appeals held that, unless §2A4.1 of the 1990 guidelines takes into account the death of the kidnaping victim as occurred in the instant case, the court could upwardly depart based on §5K2.1. The guideline specifically provides for other circumstances such as holding the victim for ransom or with a deadly weapon or for a prolonged period. It also provides an adjustment if the kidnaping was done to facilitate the commission of another offense. In this case, however, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to

murder her. The guideline does not take into account this scenario. Therefore, an upward departure to life imprisonment based on the victim's death was not an abuse of discretion.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The defendant was convicted of two counts of involuntary manslaughter for the deaths of two commuters who died when he lost control of his car while he was engaging in aggressive driving. The circuit court held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" but can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim." As an example, the court noted that bank tellers and bank customers may be indirect victims of a bank robbery. Here, the court held that there was no "evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims." The family members were not victims of the offense of conviction.

§5K2.14 Public Welfare (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The circuit court remanded the case to allow the sentencing court to determine whether the danger created by the defendant's reckless conduct while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. *See* USSG §2A1.4(a)(2). On remand, the sentencing court must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case where the factor is present. *Citing* Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035, 2045 (1996). If, on remand, the sentencing court determines that an upward departure is warranted, the court must determine a reasonable departure. In determining the extent of departure, the court may be aided by looking "to the treatment of analogous conduct in other sections of the sentencing guidelines." In the absence of useful analogies, the court must "set forth some form of principled justification for its departure determination."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The

government presented positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 `necessarily follows.'" United States v. Courtney, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Lominac, 144 F.3d 308 (4th Cir. 1998). The district court erred in reimposing supervised release following revocation of supervised release where the defendant's original offenses, Class C and Class D felonies, occurred prior to the enactment of 28 U.S.C. § 3583(h). The court of appeals held that there was an *ex post facto* violation for those defendants who committed a Class B, C, or D felony prior to the enactment of § 3583(h). Under the old law, the greatest sentence of imprisonment the defendant could receive was 24 months; under the new law, he could be sentenced to imprisonment of up to 24 months, plus supervised release of up to an additional 12 months, for a total possible punishment of 36 months. Thus, the enactment of §3583(h) had the effect of increasing the penalty for this defendant and for others similarly situated. The court implied that there was no increase in punishment, and therefore no *ex post facto* violation, for defendants who had committed a Class A or E felony, but did not explicitly rule on this issue.

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The district court did not err in sentencing the defendant to a term of supervised release even though the punishment both exceeded the maximum term of imprisonment authorized by the assimilated state statute and was not authorized by the assimilated state statute. On appeal the court noted that the Assimilated Crime Act ("ACA") provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment." However, the court determined, federal courts are not completely bound by state sentencing requirements. "Like punishment" requires only that the punishment be similar, not identical. The court noted that although the state statute does not authorize supervised release, it authorized parole. According to the court, both occur following a term of imprisonment, involve government supervision, and serve to facilitate a prisoner's transition into society. Consequently, supervised release was similar enough to parole that a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." *Cf.* United States v. Reyes, 48 F.3d 435, 437-39 (9th Cir. 1995). The court further noted that, although the total sentence did exceed the maximum term of imprisonment authorized by the state statute, under the federal system, supervised release is not considered to be a part of the incarceration portion of a sentence. To remain faithful to the federal sentencing policy regarding the imposition of supervised release, the court refused to sanction an exception for ACA defendants. Therefore, supervised release under the ACA may exceed the maximum term of incarceration provided for by state law.

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 519 U.S. 944 (1996). The district court did not err in imposing a 24-month sentence for the revocation of defendant's supervised release and then imposing a consecutive 240-month sentence for the bank robbery upon which the revocation was based. The defendant argued that the imposition of both sentences violated the Double Jeopardy Clause. In rejecting the defendant's argument, the appellate court noted that when a defendant violates the terms of his supervised release, the sentence imposed is an authorized part of the original sentence. The court noted that this conclusion is supported by the fact that the full range of protections given to a criminal defendant is not required for the revocation of supervised release. The imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. Analogously, courts have consistently held that subsequent punishment for conduct that gave rise to the revocation of probation does not violate double jeopardy. United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986). The Fourth Circuit joined the Ninth Circuit, the only other circuit court to consider this issue, in holding that the sentencing of a defendant for criminal behavior that previously served as the basis or revocation of supervised release does not violate the Double Jeopardy Clause. *See* United States v. Soto-Olivas, 44 F.3d 788, 792 (9th Cir.), *cert. denied*, 115 S. Ct. 2289 (1995).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under § 3583 `necessarily follows.'" United States v. Courtney, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Davis, 53 F.3d 638 (4th Cir. 1995). In deciding an issue of first impression, the Fourth Circuit held that the Chapter Seven policy statements regarding the revocation of supervised release are advisory in nature and are not binding on the courts. The Fourth Circuit had previously held in United States v. Denard, 24 F.3d 599 (4th Cir. 1994), that the Chapter Seven policy statements are not binding in the context of a probation revocation, and applied that reasoning here, finding no basis for a distinction between a revocation of probation and a revocation of supervised release in determining the mandatory or advisory nature of Chapter Seven policy statements.

United States v. Denard, 24 F.3d 599 (4th Cir. 1994). 18 U.S.C.A. § 3565(a) provides that when a probationer is found in possession of a controlled substance, "the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence." The "original sentence" is the defendant's original guideline imprisonment range. Therefore, the sentence must be at a minimum one-third of the maximum sentence in his original guideline range and at a maximum the guideline's maximum. This decision is consistent with United States v. Granderson, 511 U.S. 39 (1994). Although this rule may provide a sentence that is inconsistent with the probation revocation tables in guideline §7B1.4, the policy statements contained in Chapter Seven are intended to provide guidance and are not binding on the courts.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court erred in failing to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The government argued that the error was harmless, but the circuit court held that a violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea. In considering this issue of first impression, the Fourth Circuit joined the Fifth and Eleventh Circuits in concluding that a district court's failure to inform the defendant of the mandatory minimum is reversible error. *See* United States v. Watch, 7 F.3d 422 (5th Cir. 1993); United States v. Hourihan, 936 F.2d 508 (11th Cir. 1991).

United States v. Good, 25 F.3d 218 (4th Cir. 1994). The district court's failure to explain to the defendant the significance of supervised release amounted to harmless error. Although he was advised of the possible minimum and maximum penalties, the defendant claimed that he was unaware when he pleaded guilty that his punishment could include additional incarceration if he violated the terms of his supervised release. He argued that since 21 U.S.C. § 841(b)(1)(B) only provides for a minimum period of supervised release, the judge could extend his supervised release term to life and thereby expose him to the possibility of prison for life. The circuit court concluded that the maximum supervised release time for a first offender guilty of a class B felony is five years. The court pointed out that this conclusion is consistent with USSG §5D1.2 which provides for a term that is at least three years but not more than five years or the minimum period required by statute, whichever is greater, for a defendant convicted under a statute that requires a period of supervised release. Since the defendant pleaded guilty to an offense which requires a supervised release term of at least four years, he faced a maximum term of five years, not life. The lower court's failure to warn him of this conclusion was harmless error because "the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive." United States v. Moore, 592 F.2d 753, 756 (4th Cir. 1979). The circuit court noted that the Ninth Circuit accepts the interpretation suggested by the

defendant, but it explicitly declined to follow that view. *See* Rodriguera v. United States, 954 F.2d 1465 (9th Cir. 1992); United States v. Sanclemente-Bejarano, 861 F.2d 206 (9th Cir. 1988) ("pursuant to 18 U.S.C. § 3593(e)(2), a supervised release term may also be extended, potentially to a life term, at any time before it expires." *Id*. at 209).

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998). The district court's failure to inform defendant at his Rule 11 hearing that his sentence would include a term of supervised release and to describe to him the nature of supervised release before accepting his guilty plea was error. The court of appeals held that the court's oversight was not harmless error as outlined in United States v. Good, 25 F.3d 218 (4th Cir. 1994). The maximum term Thorne understood he could receive (235 months) was less than his actual sentence of 248 months (188 months in prison plus 60 months of supervised release). In the even he violated release, he would be subject to a further five years of incarceration, resulting in an even greater disparity. The court of appeals ordered that Thorne be permitted to withdraw his plea and plead anew.

Rule 32

United States v. Cole, 27 F.3d 996 (4th Cir. 1994). The district court committed plain error in denying the defendant his right of allocution, in violation of Fed. R. Crim. P. 32(a)(1)(C). The district court conducted a colloquy only after it pronounced the defendant's sentence. Further, it appeared from the record that the sentencing judge discouraged the defendant from addressing the court. Although the defendant did not object below, the circuit court found that the district court committed plain error which was prejudicial, in that the defendant may have persuaded the sentencing judge that he was responsible for a lesser quantity of drugs, that he had accepted responsibility, and merited a lower sentence.

United States v. McManus, 23 F.3d 878 (4th Cir. 1994), *cert. denied*, 517 U.S. 1215 (1996). The district court did not violate the provisions of Rule 32(a)(1)(A), which requires the sentencing court to determine that the defendant had the opportunity to read and discuss the PSR with his counsel before sentencing, by failing to pose certain questions to the defendant regarding his PSR. The Fourth Circuit declined to adopt the Seventh Circuit's approach in United States v. Rone, 743 F.2d 1169 (7th Cir. 1984), requiring the district court to ask specific questions about whether the defendant had read and discussed the PSR with counsel and whether the defendant wished to challenge any facts in the report. Rather, the Fourth Circuit held that there is no particular methodology for compliance with Rule 32(a)(1)(A). The defendant's markings such as "I surrender" on the PSR, his objections to the findings in the PSR, and his statements at sentencing about the trial evidence all indicated that the requirements of Rule 32 had been met.

See United States v. Walker, 29 F.3d 908 (4th. Cir. 1994), §1B1.3, p. 3.

Rule 35

United States v. Martin, 25 F.3d 211 (4th Cir. 1994). The district court denied the government's motion to reduce the defendant's sentence pursuant to Fed. R. Crim. P. 35(b) based

upon his extensive cooperation with the government prior to the original sentencing. The government indicated at the defendant's initial sentencing that a substantial assistance motion would be filed at a later date pursuant to office policy. Almost 12 months after the defendant's initial sentencing, the government filed its Fed. R. Crim. P. 35(b) motion. The district court denied the motion on the basis that it lacked authority to grant the departure. The circuit court held that the government was required to make a §5K1.1 substantial assistance motion at the time of sentencing for substantial assistance rendered prior to sentencing. A delay in making a substantial assistance motion, on the grounds that a Fed. R. Crim. P. 35(b) motion will be made at a later date, denies a defendant due process. However, the circuit court held that the defendant's plea agreement was effectively modified by the government's accession to make a substantial assistance motion based upon the defendant's presentence assistance, and the defendant was entitled to specific performance of this promise on remand.

OTHER STATUTORY CONSIDERATIONS

United States v. Cobb, 144 F.3d 319 (4th Cir. 1998). The district court did not err in refusing to dismiss the carjacking count against the defendant. The court of appeals rejected the defendant's argument that the federal carjacking statute, 18 U.S.C. § 2119, exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. The Fourth Circuit joined other circuits which have considered the issue in holding that the carjacking statute lies within the bounds of Congress' commerce power.